TAN AH TEE & ANOR.

v.

PAIMON BIN KASIRAN

HIGH COURT MALAYA, JOHOR BAHRU
DATO' ABDUL MALIK ISHAK J
[CIVIL APPEAL NO: 11-26-1995]
21 MAY 1996

CIVIL PROCEDURE: *Appeal - Record of appeal - What must it contain - Subordinate Courts Rules 1980, O. 49 r. 6(3).*

CIVIL PROCEDURE: *Appeal - Appeal to Judge in chambers - Notes of evidence - Grounds of judgment - Whether necessary - Form 141 - Memorandum of appeal - Form 113A - Record of appeal - Adjournment.*

CIVIL PROCEDURE: *Subordinate Courts Rules 1980 - Inadequacies - Whether to resort to Rules of the High Court 1980.*

The plaintiff ('the respondent') had brought a running down action against the defendants ('the appellants') in the Magistrate's Court. The action, however, was struck off as the respondent's solicitor was absent on the date of mention. Subsequently, the respondent filed an application to re-instate the action which was allowed by the learned Magistrate. The appellants filed a notice of appeal against the re-instatement, and the case went before the Court by way of an appeal to a Judge in Chambers under O. 49 r. 6(1) of the Subordinate Courts Rules 1980 ('the SCR').

At the hearing, two preliminary objections were raised by the respondent, ie: (1) that the appellants' record of appeal did not contain an affidavit in reply, and was, therefore, in contravention of O. 49 r. 6(3)(c) of the SCR; and (2) that there was no application for an extension of time to file the memorandum of appeal as envisaged in the recent decision of the Court of Appeal in *Yupaporn Seangarthit v. Neil Allan Campbell Webb.*

Held:

[1] The answer to what must be contained in a record of appeal to a Judge in chambers is found in O. 49 r. 6(3)(a), (b), (c), & (d) of the SCR.

[2] An appeal to a Judge in Chambers cannot be heard unless the certified copy of the notes of evidence and the certified copy of the written judgment or grounds of decision are made available to the Judge. Once these documents are ready, the Court to which the appeal was lodged shall notify the appellant in Form 141, and within 14 days from the date of service of the notice in Form 141, the appellant shall file in the High Court registry in duplicate a memorandum of appeal in Form 113A.

[3] In the instant appeal, time has not set in for the appellants until they are in receipt of Form 141. As such, the appeal was not properly put before the Court.

[4] A memorandum of appeal should not form part of a record of appeal.

[5] By virtue of O. 1 r. 4(1) of the SCR, any lacuna in the SCR must be covered by way of 'the procedure and practice for the time being in use or in force in the High Court, as near as may be to be followed and adopted.' The Rules of the High Court 1980 ('the RHC') complements the SCR in many ways, and any lacuna in the SCR must be plugged by resorting to the RHC.

Per curiam:

[1] An application for summary judgment under O. 14 of the RHC before a Senior Assistant Registrar must be made by summons and supported by an affidavit in Form 18. An application under O. 89 of the RHC for summary proceedings for possession of land before a Senior Assistant Registrar must be brought by way of an originating summons in Form 8A.

[2] Legal practitioners are in a dilemma when confronted with an appeal on interlocutory matters, especially if it involves the interpretation of O. 9 r. 6(3) of the SCR.

[3] Order 55 of the RHC does not make any reference to O. 49 r. 6(3) of the SCR, and on this score perhaps the Rules Committee may see it fit in the near future to remedy this oversight.

[Appeal adjourned for appellants to file for extension of time to file memorandum of appeal.]

Cases referred to:

Gan Hay Chong v. Siow Kian Yuh & Anor. [1975] 2 MLJ 129 ***(cit)***
Yupaporn Seangarthit v. Neil Alln Campbell Webb [1966] 1 CLJ 43 ***(refd)***
Siang Galau v. Ang Wak Hiong [1994] 1 MLJ 42 ***(refd)***
United Overseas Bank Ltd. v. Chung Khiaw Bank Ltd. [1968] 2 MLJ 85 ***(cit)***
Re ABZ (an infant) [1992] 2 SLR 442 ***(cit)***
Bright Navigation Pte. Ltd v. "Eishin Mary", Owner of [1988] 1 MLJ 482 ***(cit)***
Uni-Navigation Pte Ltd. v. Wei Loong Shipping Pte Ltd. [1993] 1 SLR 876 ***(cit)***
Re Singapore Souvenir Industry (Pte) Ltd. [1986] 1 MLJ 14 ***(cit)***
Loo Chay Meng v. Ong Cheng Hoe (Gamuda Sdn. Bhd., Garnishee) [1990] 1 MLJ 445 ***(cit)***
Hong Kong And Shanghai Banking Corp. v. Goh Su Liat (Telecommunication Authority of Singapore, Garnishee) [1986] 2 MLJ 86 ***(cit)***
Low Fong Mei & Anor. v. Ko Teck Siang & Ors. [1989] 3 MLJ 140 ***(cit)***
Tan Lay Soon v. Kam Mah Theatre Sdn. Bhd. [1992] 2 MLJ 434 ***(cit)***
Khaw Kok Sin & Anor. v. Khaw Gim Leong Co. Sdn. Bhd. & Ors. [1974] 1 MLJ 180 ***(cit)***

Pacific and Orient Sdn. Bhd. v. United Engineers (M) Bhd. [1984] 2 MLJ 143 ***(cit)***
Motor Emporium v. Arumugam [1933] MLJ 276 ***(cit)***
Jacobs v. Booths Distillery Co. [1901] 85 LT 262 HL ***(refd)***
Bristol Corp. v. Persons Unknown [1974] 1 WLR 365 ***(cit)***

Legislation referred to:
Subordinate Courts Rules 1980, O. 1 r. 4, O. 49 r. 6(1), (2), 2(4), (3)(a), (b), (c), (d), Rules of High Court, O. 55 r. 2(1), 4(2), O. 89

For the appellants - Mohd. Nazri Mohd.; M/s. Taye & Co.
For the respondent - Azman Hj. Jaffar; M/s. Azman Razak & Assoc.

JUDGMENT

Abdul Malik Ishak J:

The facts were not disputed. This was a running down case that was registered before the Magistrate's Court, Johor Bahru *vide* civil action no: 73-342/93. On 14 October 1994 the matter was fixed for mention before the learned Magistrate who in the absence of the respondent/plaintiff's solicitors forthwith struck off the case. By the notice of application dated 28 December 1994 the respondent/plaintiff's solicitors filed an application to re-instate civil action no: 73-342/93 on the ground, as reflected in the affidavit of Mr. Azman bin Hj. Jaffar that was affirmed on 24 December 1994 that the date for mention of the case was inadvertently overlooked in that it was not recorded in the diary and, consequently, there was a failure to attend Court on that date. It was deposed further that the absence of Counsel on that date was not meant to be discourteous to the Court. By way of rebuttal the learned Counsel for the appellants/defendants in the person of Mr. Raja Badrul Hisham bin Raja Mohd. Ali filed an affidavit in reply affirmed on 6 June 1995 at Malacca and there it was deposed that the reason adverted to by Mr. Azman bin Hj. Jaffar was said to be unreasonable as the negligence of Counsel had prejudiced the appellants/defendants (see for example *Gan Hay Chong v. Siow Kian Yuh & Anor.* [1975] 2 MLJ 129). Mr. Raja Badrul Hisham bin Raja Mohd. Ali deposed further that the case was an old case and the appellants/defendants would find it difficult to contact their important witnesses and that constituted prejudice. The learned Magistrate heard the application for re-instatement on 20 October 1995 and in due course granted that application. Being aggrieved, the appellants/defendants filed a notice of appeal dated 1 November 1995.

It is pertinent to make two observations. Firstly, there was no *viva voce* hearing before the learned Magistrate. Secondly, the notice of appeal was filed out of an interlocutory application that was argued before the learned Magistrate.

At the commencement of the hearing of this appeal, Mr. Azman bin Hj. Jaffar, the learned Counsel for the respondent/plaintiff, raised two preliminary objections of prime importance. Firstly, he submitted that the record of appeal did not contain an affidavit in reply affirmed on 10 August 1995 by Mr. Azman

bin Hj. Jaffar himself (it is true that the record of appeal at enclosure 6 did not contain this affidavit in reply and a copy thereof was handed and shown to the Court) and that such failure went against the grain of O. 49, r. 6 (3) (c) of the Subordinate Courts Rules, 1980 ('SCR'). Secondly, there was no application for an extension of time to file the memorandum of appeal as envisaged in the recent Court of Appeal case of *Yupaporn Seangarthit v. Neil Allan Campbell Webb* [1996] 1 CLJ 43, and, consequently, the appeal must be dismissed with costs.

Mr. Mohd Nazri Mohd, the learned Counsel for the appellants/defendants, argued to the contrary. He argued that he was not served with a copy of the affidavit in reply by Mr. Azman bin Hj. Jaffar and if he had it with him he would have gladly enclosed it in the appeal record at enclosure 6. He argued that he was not served with a notice in Form 141 as envisaged in O. 49, r. 3 (2) of the SCR and he need not prepare the appeal record incorporating Form 141 as that was not required under O. 49, r. 6 (3) of the SCR. He argued that if this Court were to exercise its discretion and gave him time to file an application to extend time to file the memorandum of appeal he would willingly file it and, in due course, serve it on the solicitors for the respondent/plaintiff within the spirit and ambit of *Yupaporn (supra).*

Since there was no trial before the learned Magistrate this appeal came before me as an appeal to a Judge in Chambers under O. 49, r. 6(1) of the SCR. The notice of appeal was filed within time (within 14 days from 20 October 1995) using Form 140 (which is reflected at page 18 of the appeal record) and all these were done within the meaning of O. 49, r. 6(2) of the SCR. The appeal record in enclosure 6 was filed well within time and under O. 49, r. 6(3) of the SCR it should be filed within three weeks (21 days) after the filing of the notice of appeal. At this juncture, the pertinent question to ask is this: What must the record of appeal to the Judge in Chambers contain? The answer is found in O. 49, r. 6(3) (a), (b), (c) and (d) of the SCR and for convenience it is reproduced hereinunder:

> (3) Within three weeks after the filing of the notice of appeal, the appellant shall file the record of appeal in the High Court and the record shall contain copies of:
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> (a) the application for the decision;
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> (b) the Statement of Claim, and where defence has been filed, the Statement of Defence;
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> (c) all affidavits filed in support of or in opposition to the application; and
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> (d) the decision appealed from,
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> but shall not include the notes of evidence, the grounds of judgment or any memorandum of appeal.

It must be stressed that the appeal record in enclosure 6 fulfilled all the requirements of O. 49, r. 6(3)(a), (b), (c), and (d) of the SCR except perhaps the non-inclusion of the affidavit in reply of Mr. Azman bin Hj. Jaffar that was affirmed on 10 August 1995 which has been satisfactorily explained by Mr. Mohd Nazri Mohd at the bar and which this Court was willing and prepared to accept bearing in mind that the preliminary objections were raised without notice to the solicitors for the appellants/defendants. Though the appeal record at enclosure 6 was filed on 20 November 1995, yet the solicitors for the respondent/plaintiff chose to suprise the solicitors for the appellants/defendants at the last moment by raising these preliminary objections in the hope that it would put the solicitors for the appellants/defendants off tangent. If that was the purpose it had achieved its desired result.

With respect, certain salient features of *Yupaporn (supra)* must be put to the fore. Firstly, in *Yupaporn (supra)* unlike the present appeal before me there was Form 141. Though *Yupaporn (supra)* proceeded by way of an interlocutory application before the Magistrate's Court yet surprisingly Form 141 was served on the appellant's solicitors there on 3 January 1994. Now, O. 49, r. 2(4) of the SCR envisages the situations whereby once the certified copy of the notes of evidence and where no written judgment is delivered the certified copy of the grounds of decision are ready for collection the Court shall notify the appellant in Form 141. Then again under O. 49, r. 3(2) of the SCR once the appeal record are ready, the Court appealed from shall serve the appellant with a notice in Form 141. Secondly, his Lordship Shankar (JCA) in *Yupaporn (supra)* held the views that O. 49, r. 6(3) of the SCR cannot abrogate the requirement of O. 55, r. 3 of the Rules of the High Court, 1980 (RHC) and that once Form 141 was served on the appellant's solicitors they should have followed up by filing and serving the memorandum of appeal within 14 days thereafter together with a copy of the appeal record and to this extent the appellant there was said to have erred. Thirdly, his Lordship Shankar (JCA) candidly said in *Yupaporn (supra)* to the effect that:

> The amendment to O. 49, r. 6 **(this must be in relation to the SCR)** was brought into effect by PU(A) 193/93. Its objective was to reduce the delay caused in the registration of appeals by the non-availability of the grounds of decision and notes of evidence which can take a long time in the lower Courts. **So for orders obtained before trial** parties were allowed to compile the record by merely including the pleadings, affidavits, and the decision appealed from together with the written application therefor. Once the appeal was registered, the grounds of judgment and notes of evidence could come later. (Emphasis added by me).

With the greatest of respect, the germane question to ask would be this: When would the grounds of judgment and the notes of evidence to be filed, if it were to come later? Under O. 49, r. 2 (4) of the SCR it is the Court that will inform the appellant that the notes of evidence and the grounds of judgment are ready for collection under Form 141. After Form 141 has been transmitted to the appellant and within 14 days from the date of service on the appellant

of Form 141 only then will the appellant file his memorandum of appeal in Form 113A as envisaged under O. 55, r. 2(1) of the RHC. But no where does it mention in O. 49, r. 6(3)(a), (b), (c) and (d) of the SCR that the appeal record should contain the notes of evidence, the grounds of judgment or any memorandum of appeal for that matter.

Fourthly, in *Yupaporn (supra)* since there was a notice in Form 141 which was served on the appellant, Shankar (JCA) rightly held that the memorandum of appeal should be filed in the High Court in duplicate within 14 days from the date of service of Form 141 to the appellant under O. 55, r. 2 (1) of the RHC and, consequently, his Lordship rightly rejected the argument by the appellant's Counsel that there was no need to file a memorandum of appeal. But in the present appeal, as I said earlier, there was no Form 141 and in such a situation must there be included in the appeal record the notes of evidence, the grounds of judgment and the memorandum of appeal? To hold otherwise would run counter to O. 49, r. 6(3)(a), (b), (c) and (d) of the SCR and, if I may add, what is the purpose of this Order if it is not meant to be followed to the letter? One must not forget that by virtue of O. 1, r. 4(1) of the SCR any lacuna in the SCR must be covered by way of "the procedure and practice for the time being in use or in force in the High Court, as near as may be to be followed and adopted". Must we therefore resort to the RHC? In my judgment, the RHC complements the SCR in many ways and any lacuna in the SCR must be plugged by resorting to the RHC. In my judgment, an appeal to the Judge in Chambers could not be heard unless the certified copy of the notes of evidence and the certified copy of the written judgment or the certified copy of the grounds of decision are made available to the Judge. Once these documents are ready the Court to whom the appeal was lodged shall notify the appellant in Form 141 and within fourteen days from the date of service of the notice in Form 141, the appellant shall file in the High Court registry in duplicate a memorandum of appeal in Form 113A as provided under O. 55, r. 2(1) of the RHC. Time has not set in for the appellants/defendants until they are in receipt of Form 141 and, consequently, it is my judgment that the appeal is not properly put before me. Without the certified copy of the written judgment or the certified copy of the grounds of decision as the case may be together with the memorandum of appeal, how can this Court proceed to hear the appeal? The filing of those documents as specified in O. 49, r. 6(3)(a), (b), (c) and (d) of the SCR as reflected in enclosure 6 are insufficient to move this Court to appeal. One must not lose sight of the fact that the memorandum of appeal should not form part of the appeal record (*Siang Galau v. Ang Wak Hiong* [1994] 1 MLJ 42). Legal practitioners are in a dilemma, just like the solicitors for the appellants/defendants here, when confronted with an appeal on interlocutory matters especially as to the interpretation of O. 49, r. 6(3)(a), (b), (c) and (d) of the SCR. The dilemma was accentuated by the absence of Form 141. It is germane to mention here that O. 55 of the RHC does not make any reference to O. 49 r. 6(3)(a), (b),

(c) and (d) of the SCR and on this score perhaps the Rules Committee may see it fit in the near future to remedy this oversight. It is not my intention to re-write the SCR or the RHC but in giving effect to O. 49 r. 6(3)(a), (b), (c), and (d) of the SCR, I have not lost sight of the inherent powers vested in me to make any order as may be necessary to prevent injustice to the appellants/defendants (O. 92 r. 4 of the RHC and the string of cases beginning from *United Overseas Bank Ltd. v. Chung Khiaw Bank Ltd.* [1968] 2 MLJ 85; *Re ABZ (an infant)* [1992] 2 SLR 442; *Bright Navigation Co. Ltd. v. 'Eishin Mary', Owners of* [1988] 1 MLJ 482; *Uni-Navigation Pte Ltd v. Wei Loong Shipping Pte. Ltd.* [1993] 1 SLR 876; *Re Singapore Souvenir Industry (Pte) Ltd.* [1986] 1 MLJ 14; *Loo Chay Meng v. Ong Cheng Hoe (Gamuda Sdn. Bhd. Garnishee)* [1990] 1 MLJ 445 especially at pages 446-447; *Hongkong and Shanghai Banking Corp. v. Goh Su Liat (Telecommunication Authority of Singapore, Garnishee)* [1986] 2 MLJ 86; *Low Fong Mei & Anor. v. Ko Teck Siang & Ors.* [1989] 3 MLJ 140; *Tan Lay Soon v. Kam Mah Theatre Sdn. Bhd.* [1992] 2 MLJ 434; *Khaw Kok Sin & Anor. v. Khaw Gim Leong Co. Sdn. Bhd. Ors.* [1974] 1 MLJ 180; *Pacific and Orient Sdn. Bhd. v. United Engineers (M) Bhd.* [1984] 2 MLJ 143 till *Motor Emporium v. V. Aruougan* [1933] MJ 276).

It was argued by Mr. Mohd Nazri Mohd, the learned Counsel for the appellants/defendants, that the appeal should be proceeded with without the need to rely upon the certified notes of evidence and the certified grounds of judgment as it was akin to a re-hearing like applications before the Senior Assistant Registrar ("SAR") under O. 14 of the RHC or even O. 89 of the RHC which finally went up for appeals to the Judge in Chambers. I beg to disagree. An application for summary judgment under O. 14 of the RHC before the SAR must be made by summons supported by an affidavit in Form 18. An application under O. 89 of the RHC for summary proceedings for possession of land before the SAR must be brought by way of an originating summons in Form 8A. The present appeal before me proceeded by way of a civil action with the necessary pleadings being filed by both parties and it arose principally out of an interlocutory application for re-instatement. The procedures adopted, under an O. 14 or O. 89 applications are poles apart from that of the present appeal and they can never be equated to be one and the same. The object of O. 14 of the RHC is to enable the plaintiff or the defendant in a counterclaim to obtain early judgment in cases where the defendant or the plaintiff in a counterclaim has practically no hope of success and any defence he raises will merely have the effect of delaying judgment. I think the object of O. 14 of the RHC has been lucidly stated by Halsbury L.C. in *Jacobs v. Booths Distillery Co.* [1901] 85 LT 262 HL in these words:

> People do not seem to understand that the effect of O. 14 is that, upon the allegation of the one side or the other, a man is not to be permitted to defend himself in Court, that his rights are not to be litigated at all. There are something too plain for argument, and when there were pleas put in simply for the purpose

of delay which only added to the expense, and where it was not in aid of justice that such things should continue. Order 14 was intended to put an end to that state of things, and to prevent sham defences, from defeating the right of parties by delay, and at the same time causing great loss to the plaintiffs who were endeavouring to enforce their rights.

Order 89 of the RHC, on the other hand, provides a simple and speedy procedure for recovery of possession of land which is in wrongful occupation of trespassers as envisaged in *Bristol Corp. v. Persons Unknown* [1974] 1 WLR 365.

To recapitulate, the appellants/defendants in the present appeal have yet to obtain Form 141. Only upon receipt of Form 141 will the appellants/defendants be able to file their memorandum of appeal within 14 days from receipt of Form 141 (O. 55 r. 2(1) of the RHC). That memorandum of appeal must be drawn up in the prescribed form otherwise the appeal may be dismissed (O. 55 r. 4(2) of the RHC). In view of the grey areas surrounding the interpretation of O. 49 r. 6(3)(a), (b), (c) and (d) of the SCR, I do not propose to proceed to hear the present appeal. I would adjourn the present appeal to enable the solicitors for the appellants/defendants to file an application for an extension of time to file the memorandum of appeal after receipt of the notice in Form 141. In the meantime, the learned Magistrate should proceed to write his grounds of judgment and supervise the preparation of the notes of proceedings to enable Form 141 to be issued. There shall be no order as to costs.

Reported by Gan Peng Chiang